ALL MALAYAN ESTATES STAFF UNION

v.

THE MALAYAN AGRICULTURAL PRODUCERS ASSOCIATION

HIGH COURT MALAYA, KUALA LUMPUR
HASHIM YEOP SANI J
[ORIGINATING MOTION NO. 18 OF 1979]
12 APRIL 1982

LABOUR LAW: *Application to quash portions of interim award of Industrial Court - Portion severable - Made without or in excess of jurisdiction.*

By a letter dated 24 October 1975 the Minister of Labour and Manpower referred a trade dispute between applicant union and the respondent association to the Industrial Court. The reference was ordered in general terms, i.e. for settlement of the dispute on a collective agreement with regard to the terms and conditions of employment. The reference was made under the then s. 23(2) [now s. 26(2)] of the Industrial Relations Act 1967 (the Act). After hearing the reference the Industrial Court handed down an interim award (No. 120 of 1978).

The application before the court sought to quash certain portions of the interim award. It was contended that those portions were severable parts of the award and made without or in excess of jurisdiction. The main grounds relied on by the applicant were as follow, that the Industrial Court:

(i) Erred in law thereby misconceiving its own powers and jurisdiction when it stated that the question of whether the award applied to all the members of the association could not properly come within its jurisdiction.

(ii) Misinterpreted the scope of s. 13(3) of the Act by holding that certain items cannot come within its purview as these cannot be in any collective agreement.

(iii) Ignored the mass of evidence before it.

(iv) Declined to make an award as to the other claims though there was ample evidence on all the claims

Held:

[1] Though when concluding a collective agreement, a trade union or employers association acts as "principal", not "agent" in its own name, whether the members are disclosed or not [*Young v. Canadian Northern Railway Company* [1931] AC 83, 89] and the issue was clearly within jurisdiction, the question was hardly crucial or material for the present purpose. The question of membership of the respondent union was not actually part of the reference made by the Minister. When the court below has jurisdiction, but misconstrues a statute, or in any other way misconceived the law, the proper course is appeal, not *certiorari*. [*R. v. Minister of Health* [1938] 4 All ER 32; [1939] 1 KB 232, 246]

Furthermore, as doubt had arisen only on the application of the award, it should have been referred back to the Industrial Court for interpretation in view of s. 32(1)(d) of the Act.

[2] The Industrial Court was clearly right in its interpretation of s. 13(3) of the Act, which subsection deals with what may not be included in the proposals for a collective agreement. The proviso to the subsection emphasises the prohibition by stating that nothing in the subsection shall prohibit the discussion of question of a general character pertaining to those subjects notwithstanding the question do not form part of the proposals.

[3] The question raised regarding the Industrial Court's misconception of the evidence or its unlawful rejection of available evidence really went to merits and was not a proper question in a review jurisdiction.

[4] In the absence of the final award it was difficult to see the real effect of the statement made by the Industrial Court or to decide what claims were actually referred to the two sentences, at the very end of the award, which were being challenged as being in excess of jurisdiction.

Certiorari is a discretionary remedy and the case before the court was one in which the discretion must be exercised not to grant the relief applied for. Though the award being challenged was an interim one, certain questions may be answered only in the final award but the final award was not in the record before the court.

The applicant had not made out a case of lack or excess of jurisdiction as claimed and the application be dismissed.

[The application is dismissed with costs.]

Cases referred to:
Young v. Canadian Northern Railway Company [1931] AC 83
R. v. Minister of Health [1938] 4 All ER 32; [1939] 1 KB 232

Legislation referred to:
Industrial Relations Act 1967, ss. 13(3), 23(2), 32(1)(d)

For the applicant - D.P. Xavier
For the respondent - V.T. Nathan

JUDGMENT

Hashim Yeop Sani:

By a letter dated 24 October 1975 the Minister of Labour and Manpower referred a trade dispute between applicant union and the respondent Association to the Industrial Court. The reference was ordered in general terms, i.e. for settlement of the dispute on a collective agreement with regard to the terms and conditions of employment. The reference was made under the then s. 23(2) (now s. 26(2)) of the Industrial Relations Act 1967. After hearing the reference the Industrial Court handed down an Interim Award No. 120 of 1978 on 30 August 1978.

The application now seeks to quash certain portions of the Interim Award and it is contended that these portions are severable parts of the award and made without or in excess of jurisdiction.

In the Award the portions sought to be quashed read as follows:

(a) at page 5 of the Award:

> "Insofar as the court is concerned, the parties to the dispute under reference are the union and the Association and it can go no further than make an award on this basis. The question as to whether the Award should apply to all members of the Association cannot properly come within the purview of the court because in effect it would mean going into the merits or demerits of the Registrar's decision in allowing the amendment, which the court is not prepared to do."

(b) at page 13 of the Award:

> "The court further agrees that certain items proposed by the union are contrary to s. 13(3) of the Act and cannot come within the purview of the Award unless they have been agreed upon. These are Items 2.3, 2.4, 4, 5, 14, 23.2, 45, 54 and 70 of "AMESU 2"."

(c) at page 23 of the Award;

> "The court has not been told by the union why there should be a distinction in salaries between the various categories. In the absence of such evidence, the court is of the view that there should be a similar starting salary for the Clerical, Medical and Health and Technical Staff and lower starting salary for the Non-Clerical Staff. If after classification, it is round necessary to distinguish between these groups, then the union and the Association can start negotiations on same upon the expiry of this Award."

(d) at page 27 of the Award:

> "As to the other claims by the union which have not been dealt with, the court is not making any award on them. The union shall not pursue these claims during the currency of the Award."

The main grounds relied on by the applicant union are as given in the statement and also in the affidavit of A.V. Kathiah, general-secretary of the union. These grounds may be summarised as follows:

(i) The Industrial Court erred in law thereby misconceived its own powers and jurisdiction when it stated that "the question as to whether the Award should apply to all members of the Association cannot properly come within the purview of the court because in effect it would mean going into the merits or demerits of the Registrar's decision in allowing the amendments which the court is not prepared to do";

(ii) The Industrial Court was wrong in law in misconstruing the scope of s. 13 (3) of the Industrial Relations Act 1967 and arriving at a finding that certain claims of the union were contrary to s. 13 (3) of the Industrial Relations Act 1967 and therefore could not come within the purview of the Award unless they have been agreed upon;

(iii) The Industrial Court ignored either deliberately or through inadvertance the mass of evidence before it adduced by both parties;

(iv) Lastly, the Industrial Court committed an error of law in that it declined to make an award as "to the other claims by the union which have not been dealt with" while there was before the court ample evidence (both oral and documentary) on all the claims of the union.

Let us now examine the parts of the Award challenged in the light of the grounds given.

The first ruling/finding attacked by the applicant concerns the first issue raised before the Industrial Court. This issue was raised in the question posed to the Industrial Court by the applicant union which reads as follows:

> "whether the Award should apply to all members of the Association, as contended by the union, or whether it should only apply to the specified estates who authorised the Association on their behalf."

The respondent Association became a trade union of employers in 1966. It has in its Constitution and Rules rule 4A which provides that:

> "The Association shall not be authorised or empowered to represent any member or group of members in any dispute or negotiations with employees or Trade Unions representing employees unless specifically authorised for the purpose by such member or group of members".

Rule 4A was approved by the Registrar of Trade Union and there was never any appeal against that by anybody.

The applicant, however, attacks this rule now as an attempt to "opt out" of the statute and should therefore be struck out. It is the applicant's contention that the doctrine of representation should be applied to the respondent Association and not agency as attempted by rule 4A.

When concluding a collective agreement a trade union or employer's association acts as "principal" not "agent" in its own name and its own account whether the members are disclosed or not. This is a statement of law established in *Yong v. Canadian Northern Railway Company* [1931] A.C 83, 89 and is now generally accepted as good proposition of law.

I agree with the applicant on this point but this question is, in my view, hardly crucial or material for the present purpose. The reference made by the Minister was on a dispute on conditions and terms of employment. The question of membership of the respondent union was not actually part of the reference although it cannot be said to be outside the jurisdiction of the Industrial Court to consider the question if the question was put to it. It is to be noticed that it is not the contention of the applicant union that the question was irrelevant or outside jurisdiction. Their contention is simply that the Industrial Court was wrong in the interpretation of its scope of jurisdiction. In my view the issue posed was clearly within jurisdiction. The Industrial Court may be wrong in its answer to the question but that is the prerogative of the Industrial Court.

In *R V. Minister of health* [1938] 4 All E.R. 32; [1939] 1 K.B. 232, 246 Greer, L.J. in the Court of Appeal approved the statement in Halsbury' s Laws of England, 2nd.ed.vol.9, para 1493:

> "Where the proceedings are regular upon their face and the magistrates had jurisdiction, the superior court will not grant the writ of certiorari on the ground that the court below has misconceived a point of law. When the court below has jurisdiction to decide a matter, it cannot be deemed to exceed or abuse its jurisdiction, merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence".

The principle is the same here. They are matters for appeal not certiorari.

Another reason why in my opinion it would not be proper to interfere with this particular portion of the Award is that it is not really a material part of the Award. The question posed although within jurisdiction was not dealing with the reference proper but on the application of the award. The Industrial Court has clearly stated that it was certain who the parties in the dispute were. Section 32 (1) (d) of the Act provides that an award of the Industrial Court shall be binding on all members of the trade union of employers to whom the dispute relates and to which dispute the union is a party. Therefore, if any doubt arose as to the application of the award, the award should have been referred back to the Industrial Court for interpretation and not brought in a review proceeding.

The second part of the Award challenged deals with the application and interpretation of s. 13 (3) of the Act. This provision deals with what may not be included in the proposals for a collective agreement. My reading of this sub-section seems to show clearly that those items specified in paragraphs (a) to (f) inclusive therein are absolutely prohibited from being included in the proposals for a collective agreement being as they are, prerogatives of the employer. Paragraphs (a) to (f) deal with promotion, transfer, filling of vacancy, termination,

(dismissal and reinstatement and assignment of special work. The proviso to the sub-section emphasises this prohibition by stating that nothing in the sub-section shall prohibit a trade union from raising in the course of any discussion questions of a general character pertaining to those subjects notwithstanding the question do not form part of the proposals. (emphasis mine). In my view nothing else can be clearer in intent. Therefore the Industrial Court was clearly right in its interpretation of s. 13 (3) of the Act.

The other complaint of the applicant is in the third part of the Award being challenged that in spite of the 26 affidavits filed by the union, the Industrial Court said it had "not been told" (page 23 of the Award) why there should be a distinction of salaries between the various categories of workers. It is the contention of the union that it is not true that there was an absence of such evidence. The ruling of the Industrial Court was therefore the direct result of its misconception of the evidence or its unlawful rejection of available evidence.

Let us now examine the context of the statement in the Award. The Industrial Court said that it had not been told by the union why there should be a distinction in salaries between the various categories of employees. This statement was followed by the ruling on similar starting salary for the clerical, medical, health and technical staff. Here it would seem obvious from the language that the Industrial Court was dealing with its own assessment of available evidence as the grounds for its ruling. I hold therefore that the question raised really goes to merits and not a proper question in a review jurisdiction.

Finally, the two sentences at the very end of the Award are challenged as being in excess of jurisdiction. As regards the first sentence it seems to be to be a statement of the obvious which need not even be said. The absence of the final award makes it also difficult to see the real effect of the statement. The last sentence is not clear as to what claims are actually referred to and the absence of a final Award gives the same difficulty. It is said that the final Award deals with salary scales and other claims. Other than that nothing else is known about the final Award.

Certiorari is a discretionary remedy, in appropriate cases the court may exercise its discretion not to grant the relief.

In my opinion this is such a case. It has been observed that the Award being challenged is an interim Award. Of course for effectiveness under s. 32 of the Act there is no real difference between an interim award and a final award but there are questions which may be left unanswered in an interim award which may be answered in the final award relating to the same dispute. Unfortunately the final Award in this case is not in the record before the court.

The respondent also invited the court to consider the question of lack of goodfaith and of unreasonable delay and acquiescence on the part of the applicant. It is agreed that the record is not complete and consists only of the interim Award and the gist of arguments. The Statement of the applicant and the Reply of the respondent and more importantly the final Award are not part of the record. In the absence of any evidence to the contrary it is not improper to conclude the inadequate record could have been due to oversight and that there was no deliberate attempt to keep the materials away from the court or an attempt to suppress the facts. As regards allegation of delay, the delay was not, in my view, unreasonable in the circumstances.

Finally, although the applicant had made several application to the Industrial Court on the interim Award as if it was implementing the award it will be observed that all these applications (six in all) dealt with matters not in the parts of the Award sought to be quashed in the present application.

The application is to be dismissed solely on the grounds that the applicant has not made out a case of lack or excess of jurisdiction in any of the parts of the Award sought to be quashed.

Also found at [1982] CLJ 362